INDEX.

PAGE

Motion for Leave to File Brief *Amici Curiae* of Consolidated Edison Company of New York, Incorporated, Public Service Electric and Gas Company and The Brooklyn Union Gas Company in Support of Petition for a Writ of Certiorari 1

Brief *Amici Curiae* of Consolidated Edison Company of New York, Incorporated, Public Service Electric and Gas Company and The Brooklyn Union Gas Company in Support of Petition for a Writ of Certiorari 6

Interest of *Amici Curiae* 6

Reasons for Granting Writ 7

I. The decision below is of broad national significance because it seriously impairs the Commission's ability to carry out its statutory obligation to regulate producer gas rates and charges under the Natural Gas Act 7

II. The decision below is based on a misinterpretation of the Natural Gas Act and is in conflict with the principles and holdings of decisions by this Court 10

III. The decision by the Court of Appeals below is in conflict with those of other Courts of Appeal 11

Conclusion 13

Table of Authorities.

PAGE

Area Rate Proceeding, et al. (Southern Louisiana), Docket Nos. AR 61-2 8

Atlantic Refining Co. v. *FPC,* 316 F. 2d 677 (D. C., Cir., 1963) 4, 11, 12

Atlantic Refining Co. v. *PSC,* 360 U. S. 378 (1959) 7

California Oil Company v. *FPC,* 315 F. 2d 652 (10th Cir., 1963) 4, 12

Phillips Petroleum Co. v. *State of Wisconsin,* 347 U. S. 672 (1954) 3, 4, 10, 11

Placid Oil Co., et al., Op. Nos. 398 and 398-A, 30 FPC 283 and 682, (1963), reversed and remanded sub nom. *Callery Properties, Inc.* v. *FPC,* 335 F. 2d 1004 3

PSC v. *FPC,* 287 F. 2d 146 (D. C. Cir., 1960) cert. denied 365 U. S. 880, 882 (1961) 3

PSC v. *FPC,* 329 F. 2d 242 (D. C. Cir., 1964), cert. denied 377 U. S. 963 (1964) 4, 12

PSC v. *FPC,* 361 U. S. 195 (1959) 3

Texaco Inc. v. *FPC,* 290 F. 2d 149 (5th Cir., 1961) 4, 11

UGI v. *FPC,* 283 F. 2d 817 (9th Cir., 1960), cert. denied 365 U. S. 879, 881 (1961) 3

UGI v. *FPC,* 287 F. 2d 159 (10th Cir., 1960) 3

UGI v. *FPC,* 290 F. 2d 147 (5th Cir., 1961), cert. denied 366 U. S. 965 (1961) 3

UGI v. *FPC,* 290 F. 2d 133 (5th Cir., 1961) cert. denied 368 U. S. 823 (1961) 3

Wisconsin v. *Federal Power Commission,* 373 U. S. 294 (1963) 3

Statutes.

Natural Gas Act,

Section 4 ..... 5, 8, 10, 11

Section 5 ..... 5, 8, 11

Section 7 ..... 4, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 671

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY and PHILADELPHIA ELECTRIC COMPANY,
Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, Trustee, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, INC., PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INCORPORATED, PUBLIC SERVICE ELECTRIC AND GAS COMPANY AND THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Consolidated Edison Company of New York, Incorporated (Con Edison), Public Service Electric and Gas Company (Public Service), and The Brooklyn Union Gas Company (Brooklyn Union), respectfully move for leave to file the accompanying brief *amici curiae* in support of the petition for certiorari. The consents of the petitioners have been obtained. The consents of the respondents have been requested but have not been granted.

Each of the movants is a public utility company which, among other things, owns and operates a retail gas dis-

tribution system for the sale of gas to the consuming public. Movant Con Edison supplies a total annual quantity of more than 47,800,000 Mcf of natural gas to some 1,275,000 domestic, commercial and industrial customers in a population of 4,700,000 persons in its gas franchise area of The Bronx, New York, Westchester and Queens (part) Counties, all located within the State of New York. Public Service supplies a total annual quantity of 110,787,000 Mcf of natural gas to more than 1,200,000 customers in a franchise area having a population in excess of 4,300,000 persons, which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to the city of Camden, all in the State of New Jersey. Brooklyn Union supplies a total annual quantity of 76,000,000 Mcf of natural gas to more than 1,300,000 consumers in a franchise area having a population of approximately 4,000,000 persons in the Counties of Kings, Richmond and Queens (part), all in the City and State of New York.

In short, the three Movants, together with the three Petitioners in this case, are responsible for the greatest volume of natural gas supplied at retail and the greatest number of ultimate gas consumers served in the States of New York, New Jersey and Pennsylvania.

The Movants have a two-fold interest in the grant of certiorari in this case. Each of them obtains a major portion of the natural gas it resells to ultimate consumers directly from Transcontinental Gas Pipe Line Corporation and indirectly through United Gas Pipe Line Company, two of the pipeline purchasers of the natural gas supplies involved in this proceeding. They are, therefore, profoundly concerned by the effect of the decision below upon the determination of the appropriate initial price certification level for this gas, for which their suppliers are now

paying, will continue to pay, and, for periods up to six years, have paid contractual initial prices at levels (up to 23.8¢ per Mcf) which were found to be out of line and unjustified as early as 1959[1]. Because of their interest in the initial prices certificated for the instant sales, Movants participated as intervenors in the *Placid* certificate proceeding before the Federal Power Commission (FPC), which culminated in the opinions and orders reversed by the Court below (*Placid Oil Co., et al.*, Op. Nos. 398 and 398-A, 30 FPC 283 and 682, (1963), reversed and remanded sub nom. *Callery Properties, Inc.* v. *FPC*, 335 F. 2d 1004), or in the various constituent proceedings which, after remand, were consolidated in the *Placid* case.

The major significance of the decision below, however, does not lie simply in its frustration of one of the Commission's recent efforts to correct long-standing error by determining, finally, the appropriate initial prices at which these sales should have been certificated in the first instance. Of far greater and more serious importance to the Movants and to the ultimate consumers they serve, is the grave threat posed by this decision to the procedures now being developed, more than ten years after the first *Phillips* decision,[2] for the effective regulation of producer gas rates and charges under Sections 4, 5 and 7 of the Natural Gas Act. The most fundamental of these procedures, examined by this Court in the second *Phillips* case of 1963,[3] is the

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[1] *PSC* v. *FPC*, 361 U. S. 195 (1959); *UGI* v. *FPC*, 283 F. 2d 817 (9th Cir., 1960), cert. denied 365 U. S. 879, 881 (1961); *Ibid.*, 287 F. 2d 159 (10th Cir., 1960); *Ibid.*, 290 F. 2d 147 (5th Cir., 1961) cert. denied 366 U. S. 965 (1961); *Ibid.*, 290 F. 2d 133 (5th Cir., 1961) cert. denied 368 U. S. 823 (1961) and *PSC* v. *FPC*, 287 F. 2d 146 (D. C. Cir., 1960) cert. denied 365 U. S. 880, 882 (1961).

[2] *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U. S. 672 (1954).

[3] *Wisconsin* v. *Federal Power Commission*, 373 U. S. 294 (1963).

area-wide approach to the determination of just and reasonable producer rates.

It was apparent at the outset that it would be essential to the ultimate success of the area rate method for the Commission to develop a consistent interim procedure, for the period prior to the determination of just and reasonable producer rates, to permit the certification of new gas sales in interstate commerce under Section 7 of the Act, on an expeditious and non-price-disruptive basis which would, at the same time, afford adequate protection to the interests of the producer applicants and the consuming public. Taking its cue from the initial price decisions of this and other courts in the late 1950s and early 1960s, and from the new area rate approach to producer pricing considered in the second *Phillips* case, the Commission adopted, as an interim measure, the area-wide, in-line initial price method for handling producer certificate proceedings. Prior to the decision below, that method had been accorded the approval of every appellate court in which producers had sought review. *Texaco Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir., 1961); *Atlantic Refining Co.* v. *FPC*, 316 F. 2d 677 (D. C. Cir., 1963); *California Oil Co.* v. *FPC*, 315 F. 2d 652 (10th Cir., 1963); and *PSC* v. *FPC*, 329 F. 2d 242 (D. C. Cir., 1964), cert. denied 377 U. S. 963 (1964).

If, however, the contrary decision of the Court below is permitted to stand, the Commission will be precluded from utilizing this procedure as an interim regulatory tool. It will, in *every* certificate proceeding, at the behest of *every* high-price producer certificate applicant, be compelled to try a case which, in magnitude and complexity, may well be equal to or greater than the *single* concurrent area rate proceeding. It will, in short, be confronted in multiple *certificate* proceedings with the very burdens which, as it told this Court, it found to be, unmanageable

and the principal reason for the necessity of an area-wide approach to producer *rate* regulation. Reimposition of this burden, at this late date, in producer certificate proceedings, will seriously jeopardize the long-awaited prospect of effective producer regulation under Sections 4, 5 and 7 of the Natural Gas Act, 15 U. S. C. §§717 c, d and f.

Because the decision below has such grave implications for Movants and the consumers they serve, the Movants are constrained to seek the permission of this Court to advance to it the arguments in support of the petition for a writ of certiorari which are set forth in the accompanying brief *amici curiae*.

Respectfully submitted,

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Interest of *Amici Curiae*.

The interest of the *amici curiae* in this case is set forth in the motion to which this brief is attached.

Reasons for Granting Writ.

I. The decision below is of broad national significance because it seriously impairs the Commission's ability to carry out its statutory obligation to regulate producer gas rates and charges under the Natural Gas Act.

If the decision below is permitted to stand, producer certificate proceedings will amount to "administrative monstrosities".

The essence of the Court of Appeals' holding is that, regardless of the propriety of a Commission finding that a proposed producer initial price is "out of line", the Commission may not, on that basis, issue an initial-price conditioned certificate of public convenience and necessity. Since it has long been established that the Commission also may not, under such circumstances, issue an unconditional certificate (*Atlantic Refining Co.* v. *PSC,* 360 U. S. 378 (1959) —CATCO), it follows from this decision that, before the Commission may act upon any producer certificate application involving a high initial price proposal, it *must* receive in evidence and give consideration to whatever cost or economic data the high-price producer certificate applicant may choose to present.

A bare outline description of the excluded cost and other data proffered by the instant respondents as applicants in the proceeding before the Commission occupies nearly a full page of the Court's opinion (335 F. 2d at p. 1009). The evidence itself, limited solely to the direct presentation of the applicants, without cross examination, included the testimony of approximately 35 witnesses and 70 exhibits, several of them running many pages in length. R. 495. It contained, essentially, individual-company cost and industry or area-wide economic data. Had these data been received in evidence, it is perfectly obvious that the inter-

ests of the consuming public would have required the preparation and presentation of similarly voluminous evidence by the Commission's staff and the distribution company intervenors; that this opposing mass of evidence would have necessitated intensive and protracted cross examination; and, if prior long experience is any guide, that this conflict in turn would have led to the submission and cross examination of equally voluminous rebuttal evidence on both sides.

The Presiding Examiner clearly recognized the chaos that would result. He stated:

> "If this mountain of cost-type, economic and financial evidence had been received in the instant proceeding the instant hearing would, in effect, have amounted to the trial of some 16 different individual producer cost-type cases, and the decisional process required would have involved, in effect, the writing of some 16 different individual producer rate decisions. Any such proceeding would plainly have amounted to an administrative monstrosity." R. 496.

In the face of this inevitable consequence of its holding, the most discouraging aspect of the Court of Appeals' opinion is its complete omission of any reference to the currently pending Section 4 and 5 area rate proceeding (*Area Rate Proceeding, et al. (Southern Louisiana)*, Docket Nos. AR 61-2, *et al.*), involving these very respondents and this very producing area, in which much of the same kind of area-wide or national data as that excluded in this proceeding has been received in evidence by the Commission and is being accorded the most thorough, searching and diligent consideration. As the Court of Appeals was well aware, that proceeding had been instituted even before the instant case was begun and, despite all efforts at expedition, those hear-

ings, which have been in virtually continuous session since the early fall of 1963, are still in progress at this date. In view of that knowledge, we are dismayed by the Court's insistence that the Commission simultaneously should have received the same kind of evidence in this proceeding and, in addition, the individual-company cost evidence which is inadmissible in the concurrent area proceeding and which, indeed, has been characterized as the major obstacle to achieving any successful system of producer regulation over the past ten years.

To suggest that by means of undetailed "resourceful ingenuity" and undefined "administrative inventiveness" (335 F. 2d at p. 1014) the Commission could have prevented the admission of this mass of evidence from bogging this certificate case down into a full-dress rate hearing, is, we submit, totally unsupported and the height of unreality.

As the Court of Appeals should have been well aware, the inevitable effect of its decision is not to confirm the Commission's use of "administrative inventiveness" but to require the Commission to convert every certificate proceeding into a super (i.e., hybrid or combined area-wide and individual-company) rate proceeding, to whatever extent the high-price producer applicant may dictate by the kind and quantity of evidence he chooses to present. To confront the Commission with that unmanageable administrative burden and that unnecessary and wasteful duplication would rapidly bog down both certificate proceedings and rate proceedings into stalemate and utter futility.

II. The decision below is based on a misinterpretation of the Natural Gas Act and is in conflict with the principles and holdings of decisions by this Court.

The Commission's adoption of the area-wide, in-line initial price approach in certificate proceedings as an interim regulatory tool was an entirely appropriate procedure under the Natural Gas Act and one that was consistent with this Court's CATCO and second *Phillips* decisions. Pending the determination of just and reasonable producer prices, this approach permits the Commission to safeguard consumers against new gas prices which are out of line. At the same time, the interests of producers are safeguarded by the right to file up to contract initial price levels under Section 4 of the Natural Gas Act, subject to the duty to refund amounts later proven to have been excessive.

It was because the Commission had not yet determined just and reasonable producer rates on an individual-company or any other basis in 1959 that this Court, in CATCO, admonished it to use its initial price conditioning powers to so safeguard the consumer in certificate proceedings. It was because the Commission represented, in 1961, that it could not practicably utilize individual-company cost evidence to determine just and reasonable rates for producers that this Court, in *Phillips*, approved its decision to abandon that regulatory approach.

We do not believe there is anything in CATCO to suggest that, prior to the finding of just and reasonable rates for any particular producer in area rate proceedings, the Commission should be compelled to receive and consider in each and every high-initial-price certificate proceeding cost and economic evidence which both (a) is germane to the determination of such just and reasonable

rates, and (b) has been received and is being considered in a pending area proceeding for the very purpose of fixing such just and reasonable rates. Until the Commission has been able to decide what conclusions are to be drawn from such evidence in a single area rate proceeding, it is inconceivable that the Natural Gas Act would require it to receive the same evidence repetitiously in innumerable prior and concurrent certificate proceedings.

Similarly, we do not believe that there is anything in *Phillips* to suggest that the Commission may be compelled to receive and consider in producer certificate cases under Section 7 of the Act the very individual-company cost evidence which the Commission showed this Court (a) was not generally useful in the determination of just and reasonable producer rates under Sections 4 and 5, and (b) was so burdensome administratively as to jeopardize the entire prospect of achieving effective producer regulation. If the Commission has been able to draw few conclusions from such evidence in rate proceedings—except as to its defects and inadequacies—it is inconceivable that the Natural Gas Act would require it to admit and consider such evidence in producer certificate proceedings under Section 7, where it would have the same shortcomings.

III. The decision below is in conflict with those of other Courts of Appeal.

As we have noted in the Motion to which this brief is attached, prior to the decision in this case the Commission's utilization of the area-wide, in-line initial price approach as an interim regulatory measure in producer certificate cases had received the unanimous confirmation of reviewing Courts of Appeal. *Texaco Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir., 1961); *Atlantic Refining Co.* v. *FPC*, 316 F. 2d

677 (D. C., Cir., 1963); *California Oil Company* v. *FPC*, 315 F. 2d 652 (10th Cir., 1963); and *PSC* v. *FPC*, 329 F. 2d 242 (D. C. Cir., 1964), cert. denied 377 U. S. 963 (1964).

In the last cited case, moreover, the Court of Appeals for the District of Columbia Circuit was presented with the very issue—the Commission's refusal to consider cost evidence—that was raised in the instant proceeding. That Court, contrary to the Fifth Circuit, specifically held that the Commission could not, at this stage in the development of producer regulatory principles and procedures, be compelled to accept and base its decision upon such evidence in certificate proceedings under Section 7 of the Act. The District of Columbia Court's opinion states:

> "Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United*

Gas Improvement Co. v. *FPC, supra,* 283 F. 2d at 823. Consideration of the proffered evidence was not essential. In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco.*" (329 F. 2d at pp. 246-7; footnote omitted).

We respectfully submit that the decision of the District of Columbia Court and that of the Court of Appeals below cannot be read consistently; they present an important and irreconcilable conflict as to a fundamental issue of interpretation of the Natural Gas Act; this conflict should be, and only can be, resolved by the decision of this Court.

Conclusion.

Since 1954, when this Court first explained the necessity for and declared the propriety of producer rate regulation under the Natural Gas Act, producer spokesmen have proclaimed the impracticality and impossibility of such regulation. If the decision below is permitted to stand it will vindicate that self-fulfilling prophesy. Ultimate gas consumers have now waited more than ten years for the realization of the Natural Gas Act's assurance of a "complete, permanent and effective bond of protection from excessive rates and charges" (CATCO, *supra,* 360 U. S. at p. 388). In their behalf we respectfully request this Court to prevent the long-awaited fulfillment of that assurance

from being throttled in its infancy. The writ of certiorari should be granted.

Respectfully submitted,

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